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Supreme Court of the United States

OCTOBER TERM, 1954

No. 376

JOHN P. PETERS, PETITIONER,

vs.

OVETA CULP HOBBY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 29, 1954

CERTIORARI GRANTED NOVEMBER 15, 1954

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,246

JOHN PUNNETT PETERS, *Appellant,*

v.

OVETA CULP HOBBY, Individually and as Secretary of Health, Education and Welfare, et al., *Appellees.*

Appeal From The United States District Court For The District of Columbia.

JOINT APPENDIX

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1 Filed Feb. 18, 1954

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN PUNNETT PETERS, 123 Marvel Road,
New Haven, Connecticut

v.

OVETA CULP HOBBY, individually and as Secretary of Health, Education and Welfare; PHILIP YOUNG, GEORGE M. MOORE and FREDERICK J. LAWTON, individually and as members of the United States Civil Service Commission; JOHN H. HESSEY, SR., JOHN H. AMEN, and WILLARD L. KING, individually and as members of the Loyalty Review Board of the United States Civil Service Commission.

Complaint For Injunction And Declaratory Judgment

Plaintiff by his attorneys, complaining of the defendants, alleges that

1. Plaintiff is a natural born citizen of the United States and is a resident of New Haven, Connecticut.

2. The defendant Oveta Culp Hobby is an individual doing business and residing in the District of Columbia with offices at 3rd and Independence Avenue, Southwest, and is Secretary of the Department of Health, Education, and Welfare of the United States Government. Said defendant is sued individually and as Secretary of the said Department. The defendants Philip Young, George M. Moore and Frederick J. Lawton are individuals found doing business in the District of Columbia with offices at 8th and F Streets, Northwest, in the District of Columbia and are members of the United States Civil Service Commission. Said defendants are sued individually and as
2 members of the said Civil Service Commission. The defendants John H. Hessey, Sr., John H. Amen and Willard L. King are individuals found doing business in the District of Columbia with offices at 8th and F Streets, Northwest, in the District of Columbia and are members of

the Loyalty Review Board of the United States Civil Service Commission. Said defendants are sued individually and as members of the said Loyalty Review Board.

3. Jurisdiction of this Court arises under §§ 11-305 and 11-306 of the District of Columbia Code, under 28 U.S.C. §§ 2201 and 2202 and under 5 U.S.C. § 1009. Jurisdiction is also based on the First, Fifth and Sixth Amendments to the Constitution of the United States, and on Articles 1 and 3 thereof.

4. Plaintiff has been a member of the faculty of the Yale Medical School, New Haven, Connecticut, since 1921 and is presently senior professor of Medicine at Yale University. He is an internationally eminent physician, educator and scientist and his name and reputation within the profession, prior to the events detailed herein, for integrity and disinterested scholarship, were excellent. He has done outstanding research for the Armed Forces and on other projects in the field of medicine, in addition to his extensive teaching and clinical duties.

5. For several years prior to 1953, plaintiff was employed by the United States as Special Consultant in the Public Health Service of the Federal Security Agency, acting an an advisory capacity to the Surgeon General of the United States Public Health Service. (On March 12, 1953, the functions of the Federal Security Agency were transferred to the Department of Health, Education and Welfare, which is hereinafter referred to as the "Department".) His duties, which required his presence in Washington for about ten days each year, related to proposals to grant federal assistance to medical research institutions under the Public Health laws. His work was not confidential or sensitive and did not entail access to, or use of, classified material. Plaintiff had been appointed to this position because of his eminence in the field of medical science; his service throughout the period of employment was of the highest value to the United States.

6. Joseph E. McElvain, Chairman of the Board of Inquiry on Employee Loyalty of the Federal Security Agency, by letter dated January 7, 1949, informed plaintiff that information relating to his loyalty had been received, and enclosed an interrogatory requesting certain information purporting to be relevant to his employment with the United States Government. This interrogatory related to membership in certain organizations and sponsorship of certain movements. Plaintiff answered this communication under oath on January 17, 1949.

7. On or about February 18, 1949, plaintiff received a letter from said McElvain stating that, on the basis of the information before the Board, it had determined that no reasonable grounds existed for belief that plaintiff was disloyal to the Government of the United States.

4 8. On or about December 18, 1951, plaintiff received a third letter from the said McElvain dated December 17, 1951. This letter contained some sixteen charges of activity purportedly evidencing disloyalty, most of which had been treated in the communications of January 7, and January 17, 1949. They related to purported membership in the Communist Party, sponsorship of certain petitions, affiliation with various organizations, and alleged association with members of, and sympathizers with, the Communist Party. The letter also advised plaintiff that he might answer the charges in writing within ten days and stated that he had a right to an administrative hearing before a panel of the Board at which he might present evidence in his behalf.

9. Plaintiff replied under oath to the charges in a letter to the said McElvain on December 26, 1951, denying that he had ever been a member of the Communist Party and setting forth information with respect to the other charges.

10. On March 13, 1952, the said McElvain, by letter to plaintiff's counsel, transmitted certain purported allegations of fact in support of the charges. These allegations were purported to be based on a part of the information

against plaintiff in the Board's files. A number of the allegations were stated to be summaries of information disclosed to unidentified government investigators by unidentified persons.

11. On April 1 and 2, 1952, the Board of Inquiry on Employee Loyalty, Federal Security Agency, conducted a purported hearing in the matter in New Haven, Connecticut.

12. The Board did not state the standard of "loyalty" applicable to the facts to be considered by it. It did not further specify the nature of the purportedly "disloyal" actions or views of plaintiff. It stated that the purported allegations in the letter of March 13, 1952, did not constitute the entire body of information against plaintiff in its files which would be considered. The sources of the purportedly derogatory information, with the possible exception of the source of the information purportedly relevant to Charge No. 9, in the Board's files were not identified or made available to counsel for plaintiff for purposes of cross-examination. They were not known to the Board. The Board specifically stated that it did not know whether the statements were under oath.

13. At the hearing, the Government tendered no documentary evidence. No witness testified that plaintiff was disloyal.

14. Plaintiff testified under oath that he had never been a member of the Communist Party and denied or explained the other charges. He answered all questions directed to him. His testimony refuted any implication of disloyalty. It was supported factually and reinforced in its conclusion by the testimony of seventeen witnesses who appeared at the hearing and by that of twenty additional witnesses in his favor who submitted affidavits, letters or statements.

15. The relevant evidence of record before the Board consisted only of testimony and affidavits favorable to the plaintiff.

16. Plaintiff was notified, by letter from said McElvain, dated May 23, 1952, that the Board of Inquiry had deter-

mined that, on all the evidence, there was no reasonable doubt as to plaintiff's loyalty to the Government of the United States.

6 17. Thereafter, by letter of April 6, 1953, Hiram Bingham, Chairman of the Loyalty Review Board, informed plaintiff that said Board had determined to conduct a post-audit of the action of the Board of Inquiry and, to this end, "hold a hearing and reach its own decision".

18. A panel of said Loyalty Review Board, composed of defendants Hessey, Amen and King, conducted a purported hearing in New Haven, Connecticut, on May 12, 1952.

19. The Chairman did not specify the standard of disloyalty to be adopted in regard to the evidence to be submitted at this hearing. He stated that the charge Number 9, which had been dismissed in the previous hearing, would not be considered in this purported hearing. But he refused to state which of the other charges were the subject of inquiry.

20. Here again no evidence or testimony was adduced in support of any of the charges. Again the identity of the purported confidential informants, whose disclosures were summarized in support of certain of the charges, was not disclosed to plaintiff. With the exception of the source of the information as to Charge 1, they were unknown to the Board. The confidential "information" was not disclosed under oath and the Board knew none of the circumstances surrounding these disclosures which would be relevant to an evaluation of the reliability or credibility thereof.

21. Plaintiff's counsel asked the panel if it would reveal the identity of the anonymous informant under Charge 1. The panel declined to reveal the identity of such in-

7 formant. Plaintiff's counsel sought to ascertain where the burden of proof lay in the present purported hearings and whether the burden was upon plaintiff to convince the Board that there was no reasonable doubt as to his loyalty or whether the Board would find in his

favor unless it was persuaded by some quantum of proof that there was reasonable doubt as to his loyalty. Again plaintiff's counsel was unable to get an answer. Plaintiff's counsel sought to ascertain the conception of loyalty entertained by the Board according to which plaintiff's behavior would be measured. Again plaintiff's counsel was unable to get any helpful answer. Plaintiff's counsel inquired of the Board whether the issue in these purported hearings was reasonable doubt as to plaintiff's loyalty to the Government of the United States or reasonable doubt as to plaintiff's complete and unswerving loyalty to the Government of the United States. Plaintiff's counsel received no answer to this question.

22. The Board stated that the record in the previous hearings would be made a part of the evidence of record in this hearing. The Chairman stated that the panel also had and would consider evidence not disclosed to the plaintiff, and perhaps not related to the charges.

23. Plaintiff again testified in his own behalf. He stated his political beliefs, his firm allegiance to democratic principles of government and the Constitution of the United States, and his loyalty to the rights of individuals as guaranteed therein. He voluntarily discussed the purported charges, and answered all questions put to him by counsel for, and members of, the Board. He set out his motives for signing the various petitions and statements made
8 the subjects of most of the purported charges. He willingly explained the circumstances surrounding membership in certain organizations, not treated in the purported charges, in reply to questions by members of the Board. He denied specifically and affirmatively that he had ever been a member of the Communist Party and testified at length to his disbelief in the doctrine of the overthrow of the government by force. He reiterated publicly expressed convictions which are specifically inconsistent with those of a Communist.

24. Five witnesses also testified in his behalf. Two of these witnesses, Doctors Welt and Nichols, ex-students at

Yale Medical School, had not testified in the previous hearing. Three of the witnesses, Ex-President Charles W. Seymour of Yale University, Dean C. M. Hugh Long, former dean of the Yale Medical School, and Judge Charles E. Clark of the Court of Appeals for the Second Circuit, had previously testified. Each stated his long acquaintance with the plaintiff and supported by specific details his firm conviction in plaintiff's loyalty to the Constitution and the Government of the United States.

25. The record contained no evidence to the contrary.

26. The aforesaid Bingham, by letter dated May 22, 1953, advised plaintiff's counsel that the panel had decided that "on all the evidence, there is a reasonable doubt as to Dr. Peter's loyalty to the Government of the United States." The letter did not disclose the basis or reasons for this conclusion. It did state that the Secretary of the Department of Health, Education and Welfare had been notified
9 of the Board's finding and recommendation that plaintiff be removed from his position with the Public Health Service, and that plaintiff had "been barred from the Federal service for a period of three years from May 18, 1953, and any and all pending applications or existing eligibilities are cancelled."

27. On June 12, 1953, the Department of Health, Education and Welfare formally advised plaintiff of his separation and disqualification for federal service. On the same day, the Surgeon General of the Public Health Service notified plaintiff of his separation from his position as Special Consultant effective June 12, 1953. No person attached to the Department exercised discretion in this matter, in that the transcript of the purported hearing had not been transmitted to the Department prior to May 29, 1953, on or before which date the Department had determined to approve and adopt the proceedings and decision of the Board.

28. On June 15, 1953, defendant Hobby stated that motions made by plaintiff's counsel that the transcript be remanded to the Loyalty Review Board in order to permit

the filing of a motion for rehearing before the full Board had been denied. On September 25, 1953, Nelson Rockefeller, Assistant Secretary of the Department of Health, Education and Welfare rejected a written request by plaintiff's counsel to discuss the matter.

29. Defendants Young, Moore and Lawton, acting as the Civil Service Commission, ordered plaintiff's eligibility for federal employment cancelled for a period of three years.

10 30. Plaintiff has suffered and is suffering substantial injury from the unlawful actions of the defendants. These actions have made employment with the federal government impossible. They have, in addition, branded him as disloyal to his country. His excellent and deserved reputation in the community and throughout the medical profession has thus been irreparably damaged, arbitrarily and without any basis in fact.

31. Plaintiff has exhausted all remedies before any and all administrative agencies of the United States. There exists no other adequate remedy at law for the injuries to which he has been and is being subjected.

32. The proceedings and hearings of the Loyalty Review Board, the decision of the Board that there was reasonable doubt of plaintiff's loyalty, the separation of plaintiff from his position and the declaration of ineligibility because of the decision of the Board, were in violation of Executive Order 9835 and the Constitution of the United States:

I. These actions were in violation of Executive Order 9835, March 21, 1947, as amended by Executive Order 10241, April 21, 1951, in that:

A. The purported charges did not, as required by Executive Order 9835, Part II, §§ 2b, 4, inform plaintiff of the charges against him "in sufficient detail, so that he will be enabled to prepare his defense" or protect his "rights of . . . notice". Certain of the purported charges communicated to the plaintiff, including the charge relating

to association with members of, and sympathizers
11 with, the Communist Party, were fatally vague and indefinite in failing to allege the time and place of specific overt acts, events, or persons. The charges did not refer to all the information against plaintiff in the Board's files which the Board eventually considered. The charges did not refer to specific overt acts of disloyalty and did not inform plaintiff in what way they supported an inference of disloyalty.

B. The purported charges were not, as required by Executive Order 9835, Part II, § 2b, "stated as specifically and completely as, in the discretion of the employing department or agency, security considerations permit." The Department exercised no discretion in determining the specificity and completeness of the purported charges. In respect to most of the purported charges the discretion, if any, was exercised by the Federal Bureau of Investigation.

C. The proceedings did not, as required by Executive Order 9835, Part II, § 4, honor the plaintiff's "rights of hearing" since no valid, effective or meaningful hearing was held before the Loyalty Review Board.

D. The purported hearing was not an "administrative hearing" as required by Executive Order 9835, Part II, § 2a, and did not produce a record from which a determination of the purported charges could be made "on all the evidence" as required by Executive Order 9835, Part V, § 1, as amended by Executive Order 10241, inasmuch as:

(1) Plaintiff was given no opportunity to confront and cross-examine any witnesses against him.

(2) Plaintiff was given no opportunity to rebut undisclosed information against him.

12 E. The purported hearing was further conducted in violation of Executive Order 9835 in that the Inquiry Board on Employee Loyalty, Federal Security Agency, treated as evidence a purported "listing" by the

Attorney General of the United States of organizations within the purview of Executive Order 9835, Part III, § 3, Part V, § 2f, which purported "listing" was not made "after appropriate investigation and determination" as required by Executive Order 9835, Part III, § 3.

F. The decision of the Loyalty Review Board was not made, as required by Executive Order 9835, Part V, § 1, "on all the evidence." No evidence of disloyalty was adduced. The information referred to the Board from other sources was not evidence and was not and could not have been properly weighed by the Board.

(1) Purported Charge No. 1 was based on the statement of an unidentified informant. While the name of the informant was known to the Board, the Board refused to disclose the name to plaintiff. The Board did not know whether the informant's statement was under oath, had no evidence about possibly relevant security considerations, and had no information upon which to evaluate the reliability of the alleged informant or the credibility of his alleged statements. The Board relied entirely upon a representation of the Federal Bureau of Investigation, the basis of which was not disclosed to it, that the informant was reliable.

(2) Purported charges Nos. 2, 3, 4, 5, 6, 7, 9, 11, 14 and 16 were also based on the statements of unidentified informants. In respect to these charges, the Inquiry Board was even unaware of the identiy of the informants, did not know whether their statements were under oath, and relied entirely on a representation by the Federal Bureau of Investigation upon undisclosed grounds that the informants were reliable.

G. The Department and Board were not, as required by Executive Order 9835, Part IV, § 2, furnished with "sufficient information about such informants on the basis of which the requesting department or agency can make an adequate evaluation of the information furnished by

them." The identity of the confidential informants and the circumstances of their statements were not even disclosed to the Board. That the Federal Bureau of Investigation's certification of reliability is no adequate basis for evaluation was demonstrated in the purported hearing where it appeared that one informant certified to be reliable was guilty of misrepresentation so gross that charge Number 9 was dismissed by the Board and was not thereafter considered either by the Inquiry Board or the Loyalty Review Board panel, that three other informants certified to be reliable were either irresponsible or deliberate falsifiers, that two informants certified to be reliable contradicted each other about the same matter, and that no reasons were presented to the plaintiff or to the Board or the Department, as to why the informants in question were believed by the Federal Bureau of Investigation to be reliable, or of the identity of the official of the Federal Bureau of Investigation who made the characterization of reliability.

H. The Board exercised power beyond its power "to make advisory recommendations ... to the head of the ... agency", as defined by Executive Order 9835, Part III, § 1a, and the defendant Hobby and the Department failed to exercise any discretion in adopting the recommendation of the Board, in that the Board's recommendation was adopted by the Department arbitrarily, and without examination of the record.

14

H. The actions deprived the plaintiff of liberty and property without due process of law in that they branded him as a person disloyal to his country, arbitrarily, without basis in fact, and without a fair procedure and hearing.

These actions were taken without adequately specific standards of loyalty, without a sufficiently definite statement of charges or allegations of fact, without a meaningful hearing, without evidence of disloyalty, without the confrontation and cross-examination of witnesses, on the

basis of undisclosed information which plaintiff had no opportunity to refute, and without a statement of the reasons plaintiff was declared ineligible and disloyal. The imposition of the penalty of ineligibility for government service constituted a violation of the prohibition against bills of attainder and *ex post facto* laws by punishing the plaintiff by declaring him ineligible to serve the Government without a judicial trial or a fair administrative hearing under accepted standards. The actions were based solely on evidence of plaintiff's political opinions as expressed in his sponsorship of, and affiliation with, the political movements which were the subject of the charges, and thus violated the right of freedom of speech and opinion. The actions constituted an exercise of judicial authority and power, not in accord with established principles of due process and in violation of Article III of the Constitution.

15 WHEREFORE, the plaintiff prays that:

1. The Court render a declaratory judgment (a) that plaintiff was improperly removed from his position as special consultant to the Public Health Service in the Department of Health, Education and Welfare; (b) that plaintiff is entitled to reinstatement to said position in the Public Health Service; (c) that defendant Hobby had no authority to remove plaintiff upon the recommendation of the Chairman of the Loyalty Review Board based on the findings and decision of the panel of that Board.

2. The Court order defendant Hobby to reinstate the plaintiff to his position as Special Consultant to the Public Health Service.

3. The Court order defendant members of the Civil Service Commission to expunge from its record the findings of the panel of the Loyalty Review Board and its decision that there was reasonable doubt as to plaintiff's loyalty to the Government of the United States.

4. The Court order the defendant members of the Civil Service Commission to expunge from its record any ruling or declaration that this plaintiff has been barred from Federal Service for a period of three years from May 18, 1953, and that all pending applications or existing eligibilities be cancelled.

5. The Court enjoin defendant members of the Civil Service Commission from interfering in any way with plaintiff's reinstatement in the Department of Health, Education and Welfare or his employment in any other position for which he is eligibile or in any other Department or Agency of the United States.

16 6. That the Court grant such other and further relief as may be just, lawful and equitable in the premises.

THURMAN ARNOLD
1229-19th Street, N. W.
Washington 6, D. C.

MILTON V. FREEMAN
1229-19th Street, N. W.
Washington 6, D. C.

Counsel for Plaintiff

FOWLER HARPER
VERN COUNTRYMAN
New Haven, Connecticut

ARNOLD, FORTAS & PORTER
1229-19th Street, N. W.
Washington 6, D. C.

Of Counsel.

* * * * * * * * * * *

17 Filed May 4, 1954

Answer

Defendants answer the allegations of the complaint as follows:

1. Defendants admit the allegations of paragraph 1 of the complaint.

2. Defendants deny that defendants John H. Hessey, Sr., John H. Amen, and Williard L. King are members of the Loyalty Review Board of the Civil Service Commission. Defendants allege that said named defendants ceased to be members of said Loyalty Review Board on September 24, 1953, on which date said Loyalty Review Board ceased to exist, pursuant to Executive Order 10450 (April 27, 1953, 18 F.R. 2489). Defendants allege that this cause is moot as to said named defendants.

Defendants admit the remaining allegations of paragraph 2 of the complaint.

3. Defendants deny the allegations of paragraph 3 of the complaint.

4. Defendants admit that plaintiff is a professor of medicine at Yale University and that he has a reputation as an eminent physician, educator, and scientist. Except as herein admitted, defendants deny the allegations of paragraph 4 of the complaint for lack of knowledge and information sufficient to form a belief.

18 5. Defendants admit and allege that for several years prior to 1953 plaintiff was employed by the United States on a when-and-as-employed basis, with compensation at a specified per diem rate for days actually employed, as Special Consultant in the Public Health Service of the Federal Security Agency, acting in an advisory capacity to the Surgeon General of the United States Public Health Service; that effective April 10, 1953, and pursuant to Reorganization Plan No. 1 of 1953 and Public Law 13, 83d Cong., 1st sess., approved April 1, 1953 (67 Stat. 18), the functions of the Federal Security Agency were transferred to the Department of Health, Education and Welfare; that plaintiff's duties in such capacity, which required his presence in Washington for from four to nine days each year, related to proposals to grant federal assistance to medical research institutions

under the Public Health Laws; that plaintiff's work was not confidential or sensitive and did not entail access to, or use of, classified material; that plaintiff was appointed to this position because of his eminence in the field of medical science and his service throughout the period of such employment was of value to the United States. Except as herein admitted, defendants deny the allegations of paragraph 5 of the complaint.

6. Defendants admit the allegations of paragraph 6 of the complaint and allege that the letter to plaintiff dated January 7, 1949, and the interrogatory (referred to in said paragraph) specified particular acts and associations of plaintiff with specified organizations, movements, and meetings as the subjects of information relating to plaintiff's loyalty.

7. Defendants admit the allegations of paragraph 7 of the complaint.

Defendants allege that by letter to plaintiff dated August 21, 1951, Ernest M. Allen, Chief, Division of Re-
19 search Grants, National Institute of Health, extended an invitation to plaintiff, in the name of the Surgeon General, to accept an appointment ending December 31, 1953. to serve as a member of a Metabolism and Nutrition Study Section; that plaintiff by a letter dated August 24, 1951, to said Ernest M. Allen accepted the invitation to serve as a member of said Metabolism and Nutrition Study Section for a term ending December 31, 1953; and that plaintiff had no appointment to any position in the Government of the United States for a term extending beyond December 31, 1953.

Defendants further allege that by letter dated May 21, 1951, L. V. Meloy, Executive Secretary of the Loyalty Review Board of the Civil Service Commission, wrote the Chairman of the Board of Inquiry on Employee Loyalty of the Federal Security Agency that plaintiff's case should be reopened and readjudicated pursuant to Executive Order No. 10241 (April 28, 1951, 16 F.R. 3690); that on

August 17, 1951, Burton L. French, Acting Chairman of the Loyalty Review Board of the Civil Service Commission wrote the Chairman of the Board of Inquiry on Employee Loyalty of the Federal Security Agency that a panel of the Loyalty Review Board had considered the complete file on plaintiff's case, had concluded that the derogatory material contained in the file was too serious to justify the adjudication of the case on the basis of an interrogatory and therefore recommended that plaintiff's case be remanded to the Board of Inquiry on Employee Loyalty of the Federal Security Agency with instructions that a letter of charges be issued to plaintiff and a hearing held thereon so that the case would be fully developed prior to an adjudication.

8. Defendants admit the allegations of paragraph 8 of the complaint and allege that the letter to plaintiff of December 17, 1951 (referred to in said paragraph) specified the particular acts and associations of plaintiff with specified organizations, movements, and meetings which constituted the basis of the 16 charges stated in said letter.

20 9. Defendants admit the allegations of paragraph 9 of the complaint and allege that by letter to plaintiff dated December 28, 1951, the Chairman of the Board of Inquiry on Employee Loyalty of the Federal Security Agency informed plaintiff that the letter of charges to plaintiff dated December 17, 1951, was sent because the Loyalty Review Board of the Civil Service Commission had remanded the case with instructions that a letter of charges be sent plaintiff and a hearing held and also because new information was received bearing on plaintiff's loyalty.

10. On March 13, 1952, the Chairman of the Board of Inquiry on Employee Loyalty of the Federal Security Agency transmitted to plaintiff's counsel a written statement of certain information in the possession of said Board as to the particular acts and associations of plain-

tiff with specified organizations, movements, and meetings which constituted the basis for said charges. Said statement indicated that certain particular items of such information had been received from confidential informants whose identities were not disclosed by said statement. Except as herein admitted, defendants deny the allegations of paragraph 10 of the complaint.

11. Defendants admit the allegations of paragraph 11 of the complaint, except that they deny that the hearing referred to in said paragraph was a "purported" hearing.

12. Said hearing before the Board of Inquiry on Employee Loyalty of the Federal Security Agency was attended by plaintiff in person and by his counsel. At said hearing plaintiff's counsel referred to the applicable standard for removal as set forth in Executive Order No. 10241 (April 28, 1951, 16 F.R. 3690). At said hearing the Chairman of the Board referred to the statement of information which had been sent to plaintiff's counsel by the Chairman's letter to him of March 13, 1952, as to the particular acts and associations of plaintiff which
21 formed the basis of the charges. The Chairman further stated that the charges which had been served on plaintiff would not be considered as evidence against him. The sources of the information as to the facts bearing on the charges against plaintiff were not identified at the hearing or made available to counsel for plaintiff for cross examination. The identity of one or more of the informants furnishing such information, but not of all such informants, was known to the Board. The Chairman stated that the Board did not know whether or not the information given by a confidential informant as to facts bearing on Charge No. 1 against plaintiff had been given under oath. Except as herein admitted, defendants deny the allegations of paragraph 12 of the complaint.

13. No witness testified at the hearing that plaintiff was disloyal. Except as herein admitted, defendants deny the allegations of paragraph 13 of the complaint.

14. At the hearing plaintiff testified under oath that he had never been a member of the Communist Party and testified with respect to the other charges against him. Plaintiff did not refuse to answer any question directed to him. Eighteen witnesses who were called by plaintiff testified at the hearing and plaintiff's counsel submitted affidavits, letters or statements by approximately 40 additional persons. Except as herein admitted, defendants deny the allegations of paragraph 14 of the complaint.

15. Defendants deny the allegations of paragraph 15 of the complaint.

16. Defendants admit the allegations of paragraph 16 of the complaint.

17. Defendants admit the allegations of paragraph 17 of the complaint and allege that the letter of April 6, 1953, referred to in said paragraph of the complaint, informed plaintiff that the review of his case by the Loyalty Review Board was made pursuant to Regulation 14 of the Regulations for the Operations of the Loyalty Review Board.

22 18. Defendants admit the allegations of paragraph 18 of the complaint except that they deny that the hearing referred to in said paragraph of the complaint was a "purported" hearing.

19. Defendants allege that at the hearing the Chairman of the panel of the Loyalty Review Board stated that Charge No. 9 against plaintiff, which had been dismissed in the previous hearing of plaintiff's case, would not be considered in the present hearing; that the panel of the Loyalty Review Board would consider plaintiff's case on the basis of the entire record before it, including the record made in connection with the earlier hearings by the Board of Inquiry on Employee Loyalty of the Federal Security Agency; and that the standard applicable to plaintiff's case was that set forth in Executive Order 9835 as modified by Executive Order 10241. Except as herein expressly admitted, defendants deny the allegations of paragraph 19 of the complaint.

20. Defendants allege that at the hearing before the panel of the Loyalty Review Board the only evidence or testimony adduced was that adduced by counsel for plaintiff; that the identity of confidential informants who had given information with respect to the charges against plaintiff was not disclosed to plaintiff; that the identity of one or more of such informants, but not of all such informants, was known to the Board; and that the information given by such confidential informants was not disclosed under oath. Except as herein expressly admitted, defendants deny the allegations of paragraph 20 of the complaint.

21. Defendants allege that the panel declined the request of plaintiff's counsel to reveal the identity of the confidential informant who had given information in connection with Charge No. 1; that the Chairman stated that the panel would reach its own conclusion, upon all the evidence, as to whether there was a reasonable doubt of plaintiff's loyalty, but declined further to specify where
23 the burden of proof lay; and that the Chairman stated that the applicable standard was that provided by Executive Order 9835 as modified by Executive Order 10241. Except as herein expressly admitted, defendants deny the allegations of paragraph 21 of the complaint.

22. Defendants allege that the Chairman of the panel stated that the record in the previous hearings of plaintiff's case would be made a part of the evidence of record in the present hearings; and that the panel would consider evidence given by confidential informants not disclosed to plaintiff. Except as herein expressly admitted, defendants deny the allegations of paragraph 22 of the complaint.

23. Defendants allege that at the hearing before the panel of the Loyalty Review Board plaintiff testified in his own behalf; that he stated certain of his political beliefs and his motives for engaging in certain actions and

associations which were the subjects of the charges against him; that he answered all questions put to him by counsel for and members of the panel; and that he denied that he had ever been a member of the Communist Party. Except as herein specifically admitted, defendants deny the allegations of paragraph 23 of the complaint.

24. Defendants admit that the five witness identified in paragraph 24 of the complaint testified on behalf of plaintiff at the hearing; that three of them had testified at earlier hearings in plaintiff's case; and that each stated his acquaintance with plaintiff over a period of several years and his firm conviction in plaintiff's loyalty. Except as herein specifically admitted, defendants deny the allegations of paragraph 24 of the complaint.

25. Defendants allege that at the hearing before the panel of the Loyalty Review Board no evidence was adduced except that adduced by counsel for plaintiff, but allege that the entire record on which the panel of the Loyalty Review Board considered plaintiff's case contained evidence contrary to that adduced by counsel for plaintiff. Except as herein specifically admitted, de-
24 fendants deny the allegations of paragraph 25 of the complaint.

26. Defendants admit the allegations of paragraph 26 of the complaint and allege that the letter of May 22, 1953, referred to in said paragraph of the complaint, advised plaintiff that he had been barred from the federal service for a period of three years from May 18, 1953, and any and all pending applications or existing eligibilities were cancelled pursuant to Civil Service Regulation 5.101(a) (5 C.F.R., § 5.101(a)).

27. Defendants admit that on June 12, 1953, the Surgeon General of the Public Health Service notified plaintiff of his separation from his position as Special Consultant in the Public Health Service effective June 12, 1953. Except as herein expressly admitted, defendants deny the allegations of paragraph 27 of the complaint.

28. Defendants admit that on June 15, 1953, defendant Hobby wrote plaintiff's counsel that requests by him that the transcript be remanded to the Loyalty Review Board to permit the filing of a motion for rehearing before the full board had been denied, on the ground that plaintiff had appeared and offered evidence at two hearings, that under all the circumstances it did not appear that a stay of proceedings or further hearings would be in the interests of the federal service, and that there appears to be no authority for a remand by a department to the Loyalty Review Board. Defendants admit that on September 25, 1953, Nelson A. Rockefeller, Under Secretary of the Federal Security Agency, wrote plaintiff's counsel that the Secretary of the Federal Security Agency had given due consideration to plaintiff's case and that a discussion with plaintiff's counsel would not seem to be of any assistance in determining a further course of action but that if plaintiff's counsel desired to submit a brief on legal or procedural arguments, it would be received and considered. Except as herein expressly admitted, defendants deny the allegations of paragraph 28 of the complaint.

25 29. Defendants admit that the Loyalty Review Board, as the duly authorized agent of defendant Young, Moore and Lawton, the members of the Civil Service Commission, ordered plaintiff's eligibility for federal employment canceled for a period of three years from May 18, 1953, pursuant to Civil Service Regulation 5.101(a) (5 C.F.R., § 5.101(a)).

30. Defendants admit that their actions have as a practical matter made plaintiff's employment with the Federal Government impossible until May 18, 1956. Defendants deny that they have branded plaintiff as disloyal to his country or that they have committed any unlawful acts against him. Except as herein expressly admitted, defendants deny, for lack of knowledge and information sufficient to form a belief, the allegations of paragraph 30 of the complaint.

31. Defendants admit the allegations of paragraph 31 of the complaint except that they deny, for lack of knowledge and information sufficient to form a belief, that plaintiff has been or is being subjected to injuries.

32. Except as expressly admitted in the preceding paragraphs of this answer, defendants deny the allegations of paragraph 32 of the complaint.

ADDITIONAL DEFENSES

1. The complaint fails to state a claim upon which any relief can be granted.

2. As to defendants Hessey, Amen, and King, members of the former Loyalty Review Board, the case is moot.

WARREN E. BURGER
Assistant Attorney General

EDWARD H. HICKEY
Attorney, Department of Justice

DONALD B. MACGUINEAS
Attorney, Department of Justice

* * * * * * * * * * *

27 Filed May 7, 1954

Motion For Judgment On The Pleadings Under Rule 12

Plaintiff moves the Court to enter judgment on the pleadings in favor of plaintiff herein on the ground that plaintiff is entitled to judgment as a matter of law on the undisputed facts appearing in the pleadings.

As grounds for the motion, plaintiff states that it appears clearly from the complaint and answer that plaintiff was dismissed from government employment on the basis of

a finding of reasonable doubt as to his loyalty which was made in violation of Executive Order 9835 and the Constitution of the United States.

Respectfully submitted,

THURMAN ARNOLD
1229-19th Street, N. W.
Washington 6, D. C.

MILTON V. FREEMAN
1229-19th Street, N. W.
Washington 6, D. C.
Counsel for Plaintiff

FOWLER HARPER
VERN COUNTRYMAN
New Haven, Connecticut

ARNOLD, FORTAS & PORTER
1229-19th Street, N. W.
Washington 6, D. C.
Of Counsel.

Date: May 7, 1954

* * * * * * * * * *

30 Filed May 13, 1954

Motion of Defendants For Judgment On The Pleadings

Now come defendants and move the court for judgment on the pleadings in favor of defendants on the basis of the undisputed facts appearing in the complaint and answer.

Defendants allege the following grounds for such motion:

1. The complaint fails to state a claim upon which relief can be granted.

2. The cause is moot in that plaintiff's term of appointment to the position from which he was removed has completely expired.

3. The cause is moot as to the defendants Hessey, Amen and King since they are sued as members of the Loyalty Review Board of the Civil Service Commission and that board is no longer in existence.

WARREN E. BURGER
Assistant Attorney General

EDWARD H. HICKEY
DONALD B. MACGUINEAS
Attorneys, Department of Justice

Counsel for Defendants

* * * * * * * * * *

37 Filed May 19, 1954

Order For Judgment On The Pleadings For Defendants

This cause came on to be heard on cross motions of plaintiff and defendants for judgment on the pleadings, and counsel having been heard, it is hearby

ORDERED that the defendants' motion be and it is hereby granted, that the plaintiff's motion be and it is hereby denied, and that judgment on the pleading be and it is hereby entered for the defendants.

EDWARD A. TAMM
Judge

Dated: May 19th, 1954

* * * * * * * * * *

38 Filed May 19, 1954

Notice of Appeal to Court of Appeals Under Rule 73(b)

Notice is hereby given that John Punnett Peters, pla
tiff above named, hereby appeals to the United Stat
Court of Appeals for the District of Columbia from t
final judgment on the pleadings for defendants entered
this action on May 19, 1954.

THURMAN ARNOLD

Attorney for Plaintiff
John Punnett Peters
1229 - 19th Street, N.W.
Washington 6, D. C.

[fol. 27] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS

[Title omitted]

STIPULATION—Filed August 3, 1954

Appellant and appellees, by their respective counsel, stipulate as follows:

1. Appellant was, at the time of his separation from office by the Surgeon General of the Public Health Service, employed as a Special Consultant in the Public Health Service, Department of Health, Education and Welfare, on a when-and-as-employed basis, with compensation at a specified per diem rate for days actually employed, to advise the Surgeon General with respect to proposals to grant federal assistance to medical research institutions under the Public Health Laws.

2. At such time appellant was a professor of medicine at Yale University and he was appointed to this consultant position because of his eminence in the field of medical science.

3. At the time of both his appointment to and removal from such consultant position, the following group of positions was excepted from the classified competitive service; i.e., placed in Schedule A to Civil Service Rule No. 6:

> "Professional, Scientific, and technical experts for temporary part-time or intermittent employment for consultation purposes." (5 C.F.R., § 6.101(n).)

[fol. 28] At such times Civil Service Rule VI provided that "Appointment under either Schedule A or B shall not confer a competitive status" (5 C.F.R., § 6.1(d)).

4. Accordingly, appellant was not in the classified competitive civil service when he was separated from his consultant position.

(S.) Thurman Arnold, Counsel for Appellant. (S.) Warren E. Burger, Assistant Attorney General. (S.) Paul A. Sweeney, Attorney, Department of Justice. (S.) Donald B. MacGuineas, Attorney, Department of Justice, Counsel for Appellees.

[fols. 29-30] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, APRIL TERM, 1954

No. 12,246

JOHN P. PETERS, Appellant,

v.

OVETA CULP HOBBY, et al., Appellees

Appeal from the United States District Court for the District of Columbia

Before Edgerton, Miller, and Prettyman, Circuit Judges

JUDGMENT—Filed August 5, 1954

The above-entitled case came on for consideration on the record on appeal from the United States District Court for the District of Columbia, on appellant's motion to enter judgment on the merits without formal briefs or argument and on appellees' reply thereto, and on the stipulation of the parties filed herein August 3, 1954. The parties agree that the case presents the same issue decided by this Court in Bailey v. Richardson, 86 U.S. App. D.C. 248, 182 F. 2d 46 (D.C. Cir. 1950). The Supreme Court affirmed the judgment of this Court therein by an equally divided Court, Bailey v. Richardson, 341 U.S. 918. We feel obliged to follow the ruling in that case in the determination of the present case.

On Consideration Whereof, It is Ordered by this Court that appellant's motion for the entry of judgment on the merits in this case without formal briefs or argument be, and it is hereby, granted, and it is Further Ordered and Adjudged by this Court that the judgment of the United States District Court for the District of Columbia on appeal herein be, and it is hereby, affirmed.

Dated: August 5, 1954.

Per Curiam.

Edgerton, Circuit Judge, concurs in granting appellant's motion but dissents, for the reasons stated in his dissent in Bailey v. Richardson, from the judgment of affirmance.

[fol. 31] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 32] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed November 15, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.